SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955

No. ~~625.~~ 38

JAMES C. ROGERS,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

PETITIONER'S REPLY

To Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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To Respondent's Brief in Opposition to Petition for Writ of Certiorari.

To the Honorable The Supreme Court of the United States of America:

We think there was ample evidence from which the jury could and did find that the culvert was not properly maintained; that the culvert did not provide adequate footing for the petitioner to move under the circumstances in evidence, and that respondent's failure in this respect was one of the contributing causes of petitioner's injury. Respondent draws a different conclusion from the evidence, but the debatable quality of that issue was for the jury. In any event that issue was not a decisive or controlling one.

It was not incumbent upon the petitioner to prove that the respondent's failure to furnish adequate footing was the sole cause of his injury. That was not the petitioner's theory, nor was it the only element of negligence submitted to the jury. Even if the jury found that the culvert and the walkway were literally perfect, or that the petitioner would have been injured regardless thereof, it was still warranted in finding that the respondent was negligent in adopting an unsafe and dangerous method of work.

The evidence showed that respondent's method of work was unsafe and dangerous in that (a) the petitioner was required to burn weeds which had previously been chemically prepared so that they would ignite rapidly; (b) the petitioner was furnished a hand torch to ignite the weeds, and the physical limitation of the hand torch required the petitioner to be in close proximity (within six feet) of the flame; (c) the petitioner was required to burn the weeds in such close proximity to respondent's tracks that air disturbance from trains passing at 35 to 40 miles per hour would blow the fire toward the petitioner; (d) the respondent did, in fact, operate his train at a speed of from 35 to 40 miles per hour and did cause the fire to blow toward the petitioner; (e) the respondent continued to impose the duty upon the petitioner to stand on the west shoulder and to inspect and watch the passing train for "hot boxes"; (f) the respondent did not provide petitioner with a path or other means adequate for escape from the fire.

The first five of these negligent acts of the respondent caused the petitioner to be placed in a position of imminent peril. The fire came right up in his face (R. 23). This caused him to retreat quickly (R. 23, 28, 63). He threw his left arm over his face, backed away rapidly, six or eight feet, onto the culvert immediately north of him. While thus backing away, he did not and could not look to see where he was going (R. 23, 68). At this time he had fire and smoke in his eyes and could not see (R. 23, 68).

Under these circumstances, petitioner might well have jumped, rolled, dived or done anything else in order to save himself from the ravages of the fire. He could not be expected to stand still and burn. Had he jumped, he still would be entitled to recover even though he jumped from a surface that was perfectly flat. However, he did not jump but moved onto the culvert where he had a right to expect a haven of safety. There he was caused to fall because of the abnormal condition of the culvert due to the sloping crushed rock placed upon it (R. 113).

Respondent emphasizes the fact (Brief p. 9) that the petitioner walked "backwards, blindly and rapidly", in order to escape the perils of this fire. With fire in his face, it was only natural for him to back away from the fire. Under these circumstances, of course, he could not see and of necessity his movements would have to be rapid if he were to avoid complete envelopment. So what the petitioner did is exactly what anyone would have been expected to do under the circumstances.

Based on the foregoing facts, respondent concludes that it is the petitioner's contention that "every railroad in the United States would be required to maintain a walkway along every mile of its line, wide enough and level enough and safe enough for every employee to walk along, backwards and with his arm over his eyes, even over drainage culverts which are intended to allow water to pass under the railroad right of way rather than to be used as walkways" (Brief, pp. 9, 10).

The petitioner has never made any such ridiculous contention and does not do so now. Petitioner simply states that when respondent subjected the petitioner to the unusual hazards of fire by requiring him to stand in close and dangerous proximity to an oncoming train, which would and did cause said fire to spread rapidly, that then he owed the petitioner the nondelegable and continuing

duty to provide a reasonably safe place in which to perform the tasks assigned to him. Otherwise respondent had no right to compel petitioner to stand on the west shoulder while performing the duty of watching said train for "hot boxes," and when he did so, the method of work became thereby unsafe and dangerous.

We think the condition of this particular culvert increased the petitioner's peril and contributed to his injury. But even if it did not do so, respondent remains liable for his prior acts of negligence in creating the peril which caused petitioner to move and act as he did.

Respondent in his brief does not and cannot defend his conduct in the five respects enumerated above (a) through (e). In discussing this "supposed issue" (Brief, p. 12), respondent simply attempts to justify the use of the hand torch instead of the "weed burning machine." Here again, petitioner is not contending that the use of the hand torch alone endangered his safety. We have spelled out the reasons why respondent's method was unsafe and dangerous and the fact that respondent and the state court ignored them only makes them stand in bold relief.

In arguing that petitioner did not make a submissible case, respondent bases his entire position upon fallacious assumptions. He erroneously assumes that all of his obligations under the law were fulfilled merely because (1) the pathway and culvert might be said to have been reasonably safe for men using the same under circumstances different from those which confronted the petitioner on the occasion in question and (2) the hand torch in and of itself was not a dangerous instrumentality.

Indulging in these assumptions, respondent chooses to ignore the manner, method, place and environment in which the petitioner was then and there required to use the torch, shoulder, pathway and culvert. Petitioner was not merely walking along respondent's tracks performing

a routine task, getting from one place to another, nor was he using the torch at a place free from hazard. In the first place, he was dealing with fire. He was handed an improvised device and compelled to adopt a highly dangerous method of lighting weeds which had been previously sprayed for the very purpose of causing them to ignite and burn rapidly. On top of all of this, another duty was imposed upon him—he was ordered to stand on the west shoulder in close proximity to a passing train in order to watch for "hot boxes." Without any prior experience, he had to contend with an oncoming train which caused the fire to spread rapidly. It afforded him no opportunity for cool and collected judgment. As soon as he heard it whistle, he was required to run away from his position immediately next to the fire in order to comply with the only instruction given to him. The end of the path was at the culvert.

Petitioner did not have as much warning of the approach of the train as if the foreman had called the train in accordance with the customary practice (R. 62), but plaintiff did think that he had plenty of time in spite of the foreman's failure to call the train (R. 62). His thinking, of course, was influenced by his inexperience and his lack of knowledge of the hazards which later confronted him. The fact remains that petitioner's time for performing his two duties was decreased by the foreman's failure. It is absurd to say (Brief, p. 13) that merely because he came "from a rural area of Arkansas" that he should have known exactly what the passing train would do to the fire. He certainly had a right to assume that his foreman would not require him to do two things at one and the same time that could not be accomplished with reasonable safety under the circumstances. Of course he did not know, and had no way of knowing, that the speed of the train and the wind therefrom would cause the intervening space to be enveloped so quickly. Although petitioner did say that

he knew the movement of the train would cause some wind, he thought its distance away from him to the east was such that it would not blow the fire dangerously close to him (T. 86-88). It must be remembered that petitioner had absolutely no experience in doing this type of work, the occasion in question being the very first time petitioner had ever been so employed (T. 15).

Respondent's position is empty for two reasons: First, it is based upon the fallacies already noted. Second, it simply does not deal with the record facts upon which the petitioner relies for recovery. He sets up a straw man in his contention that the place of work was reasonably safe under ordinary circumstances for section men generally but does not deal with the situation that existed at the time of petitioner's injury. Respondent cannot be relieved of his duty because petitioner's work at the place and by the method in question was fleeting or infrequent. Bailey v. Central Vermont R. Co. (1943), 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The state court's faulty conclusions are due to the fact that it detaches and separates (1) the instrumentalities involved, (2) the place of work and (3) the method of work each from the other. By this process it was able to say that the torch in and of itself was not dangerous; the train was perfectly safe; the culvert was adequate for ordinary purposes. These truisms take on a different meaning, however, when we consider the manner in which they were being used at the time of petitioner's injury. For illustration, a cow is a docile animal; an oil lantern is a simple appliance; barns are common place structures; but we learned through Mrs. O'Leary that they cannot be used successfully in close and dangerous proximity to each other.

The state court's independent resolution of this testimony was illogical, an invasion of the province of the jury, and it is in conflict with the decisions of this Court.

Those decisions, incidentally, are so crystal clear that it is not difficult for a state court to follow its path of duty with reference to the jury's function. When it fails to do so it is not incumbent upon the petitioner to show that the state court's judgment is "shocking to the conscience of this Court" (Brief p. 7). If such a test must be applied, then it can be said truthfully that the state court's judgment herein must be placed in the "shocking category."

Petitioner again prays that the judgment of Division No. 1 of the Supreme Court of Missouri in this cause be reversed with directions that the judgment of the trial court be affirmed.

Respectfully submittted,

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